IN THE

Supreme Court of the United States

October Term, 1977

No. **77-946**

JOHN IANNONE and IRVING ALBAHARI,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In the

SUPREME COURT OF THE UNITED STATES

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No._____

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JOHN IANNONE and IRVING ALBAHARI,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - - - - -X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, JOHN IANNONE and IRVING ALBAHARI, jointly and severally, respectfully pray that this Court issue a writ of certiorari to review the order of the United States Court of

Appeals for the Second Circuit made in the above case on the 24th day of June, 1977, affirming their convictions in the United States District Court for the Southern District of New York, for the crime of violating 18 U.S.C. §1955 (one count) and a conspiracy to do so, after trial before Weinfeld, D.J., and a jury.

OPINION BELOW.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court without formal opinion. The order of affirmance is annexed hereto as part of the appendix. The decision of opinion of Honorable Edward Weinfeld in the District Court is reported at 423 F. Supp. 908 (SDNY) [*United States v. Esposito, et al.*].

JURISDICTION.

The jurisdiction of this Court is predicated upon 28 U.S.C. §1254(i) and the Rules of the Supreme Court, Rule 22(2). The order of affirmance of the Second Circuit was dated June 24, 1977, and a petition for rehearing on behalf of IANNONE and ALBAHARI was denied on December 5, 1977, a copy of which is annexed and made part of the appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth, Fifth and Sixth Amendments of the United States Constitution, as well as 18 U.S.C. §§1955; 2510-2520; and Rules 6, 7, 10, 11, 12, and 52 of the Federal Rules of Criminal Procedure, are involved.

ADOPTION OF PETITIONS OF YARMOSH, BOTTA AND MESSINA.

The petitioners herein adopt the petitions and arguments heretofore filed by their co-defendants at trial, namely JOHN YARMOSH, NICHOLAS BOTTA, and LAWRENCE MESSINA.

QUESTIONS PRESENTED.

1. Whether the Circuit Court and the Trial Court below erred with respect to the Trial Judge's failure to suppress electronic recordings of telephone conversations obtained by Court order, since the Government failed to seal them "immediately" upon achievement of the object of the wiretap order? (Fourth Amendment; 18 U.S.C. §§2510-2520).

2. Whether petitioner ALBAHARI was denied due process of law because the Trial Court never arraigned him on the

indictment, nor was he given an opportunity to address motions with respect thereto? (Fifth Amendment and Rule 12, F.R.Cr.P.).

3. Whether the instructions to the jury were defective and violative of due process since they were never informed which group of five persons were allegedly involved in the violation of 18 U.S.C. §1955? (Fifth Amendment).

4. Petitioners herein adopted the motions of co-defendants, with respect to wiretapping. Whether an application in support of an electronic surveillance order sought in order to investigate illegal gambling operations sufficiently establishes the inadequacy of other investigative techniques, pursuant to 18 U.S.C. §2518(1)(c), where its allegations of inadequacy substantially

consist of statements as to the difficulties of investigating gambling operations in general? [See Petition of Yarmosh.]

5. Whether *United States v. Donovan*, 429 U.S. 413, 50 L. Ed. 2d 661 (1977) should have been applied with reference to the motion made before the Trial Judge?

STATEMENT OF THE CASE.

Petitioners herein were indicted along with several others, including Yarmosh, Botta and Messina, with two counts, one charging participation in illegal gambling business in violation of 18 U.S.C. 1955, and the second, a conspiracy under 18 U.S.C. 371, to do so. Yarmosh, Botta and Messina, after moving to suppress certain electronic surveillance, pled guilty to the conspiracy

count. Their right to appeal was preserved with respect to all pretrial rulings, and as to Yarmosh, a ruling denying his application of January 26, 1977, for leave to move to suppress wiretap evidence.

This case involved a so-called gambling syndicate operating in East Harlem. A co-conspirator named Robert Breindel, who testified for the Government, was perhaps the most important witness against petitioners herein. There were no recorded telephone conversations admitted into evidence containing the voice of ALBAHARI. IANNONE was subject to electronic surveillance of extremely short duration.

In the original indictment ALBAHARI was referred to as "Brooklyn". IANNONE was called "Kodak". A superseding

indictment was returned, giving ALBAHARI's nickname as "AC" but ALBAHARI was never arraigned on this indictment, although the conviction rests upon it.

The prosecution admitted that there really were four groups, distinct each from the other, running the operations and therefore, petitioners maintain multiple conspiracies existed and the indictment, charging only one conspiracy, was never proved.

Originally, F.B.I. Agent Robert Walsh testified that when he debriefed Breindel, the latter had identified "Brooklyn" as being petitioner ALBAHARI. Breindel was not clear as to who IANNONE was and whether he was nicknamed "Kodak". Breindel referred to him as "Johnny" (240-242; 249-252)*

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* Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

A tape recording, supposedly containing the voice of IANNONE, contained only 28 words and was far from overpowering.

The Government offered no logical explanation as to why the tapes were not promptly sealed immediately after the determination was made that the location being tapped was no longer operational. The prosecutor hinted that he wanted to make sure the bugged wire room was really closed. (H-94-96)**

** Numerals preceded with the letter "H" refer to pages of the suppression hearing.

POINT I.

THE COURT BELOW ERRED IN NOT SUPPRESSING THE ELECTRONIC RECORDINGS OF TELEPHONE CONVERSATIONS SINCE THE GOVERNMENT FAILED TO SEAL THEM "IMMEDIATELY" UPON THE ACHIEVEMENT OF THE OBJECT FOR WHICH THE ORDER WAS GRANTED. ERGO, THE LETTER AND SPIRIT OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT (18 U.S.C. 2510-2520) WAS VIOLATED.

There appears to be no rational basis for the prosecutor failing to comply with the strict provisions of the Omnibus Crime Control Act Title III (18 U.S.C. 2510-2520).

The Supreme Court has interpreted the statute, but until *United States v. Donovan, supra,* did not reach any specific conclusions. See *United States v. Kahn,* 415 U.S. 143 (1974); *United States v. Giordano,* 416 U.S. 505 (1974); *United States v. Chavez,* 416 U.S. 562 (1974); see also, *Bynum v. United States,* 423

U.S. 952 (1975) [Justice Brennan dissenting], denying cert. to 513 F. 2d 533 (C.A. 2, 1975); *Scott v. United States*, 425 U.S. 917 (1976).

The Circuit Court has passed on the issue preliminarily and ruled in another case, *United States v. Gigante* (2d Cir. 1976), 538 F. 2d 502, that a failure to comply strictly with the immediacy requirements of 18 U.S.C. 2510-2520, was fatal and required suppression.

Consistent with this approach is *People v. Sher*, 38 N. Y. 2d 600, and *People v. Nicoletti*, 35 N. Y. 2d 249.

The Court, in *Gigante*, specifically distinguished the Third Circuit's opinion in *United States v. Falcone*, 505 F. 2d 478, cert. den. 420 U.S. 955.*

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* There seems to be a split among the Circuits on this matter.

See also, the dissent in *United States v. Giordano*, 416 U.S. 505, and *United States v. Chavez*, 416 U.S. 562.

The requirements of Section 2518(8)(a) were not met and this is unquestionably a basis for suppression of the recorded evidence.

In *United States v. Gigante, supra*, the Court explained:

> "We recently had occasion to observe that Congress, in enacting Title III's sharply detailed restrictions on electronic surveillance, intended to 'ensure careful judicial scrutiny throughout' the process of intercepting and utilization of such evidence. *United States v. Marion*, No. 75-1408 (2d Cir. May 7, 1976), pp. 3567, 3568.

"The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8) (a) was intended 'to insure that accurate records will be kept of intercepted communications.' S. Rep. 1097, 90th Cong., 2d Sess., *quoted in* 2 U.S. Code Cong. & Ad. News, 2193 (1968). Clearly all of the carefully planned strictures on the conduct of electronic surveillance, *e.g.*, the 'minimization' requirement of §2518 (5), would be unavailing if no reliable records existed of the conversations which were, in fact, overheard. Maintenance of the integrity of such evidence is part and parcel of the Congressional plan to 'limit the

use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' *United States v. Giordano*, 416 U.S. 505, 527 (1974). Moreover, it plays a 'central role in the statutory scheme.' *Id.* at 528. See also, *United States v. Chavez*, 416 U.S. 562 (1974).

"The Government has conceded that the requirements of §2518(8)(a) have not been met. Nor is it disputed that failure to comply with that subsection is a ground for suppression of recorded evidence.[5] Rather, the Government

5. In light of our holding today that §2518(8)(a) offers an independent basis for excluding the evidence from trial, we need not consider whether the tapes are also rendered inadmissible by §2518(10)(a), the general provision of the Act.

argues that this is not a case where the 'Draconian' sanction of suppression is warranted, since the appellees have been unable to present any evidence of actual tampering with the tapes.

"To demand *such an extraordinary showing*, however, would vitiate the Congressional purpose in requiring judicial supervision of the sealing process. Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected. The judicial sealing requirement, therefore, provides an external safeguard against tampering with or

manipulation of recorded evidence. The sealed tapes become 'confidential court records'[6] and cannot be unsealed in the absence of a subsequent order. When these safeguards are compared with the haphazard procedures employed in this case, the wisdom of Congress becomes manifest.

"Moreover, the plain language of the statute requires that this evidence be suppressed. Section 2518(8)(a) states, *inter alia*, that:

> "'The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, *shall be a pre-*

6. S. Rep. 1097, 90th Cong., 2nd Sess., *quoted at* 2 U.S. Code Cong. & Ad. News p. 2193 (1968).

> *requisite* for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom * * *.'" (Emphasis supplied.)

The further argument that the order by its terms did not expire until July 1st, is also not cogent because in the area of electronic surveillance wherein the strictest standards are required, as *Gigante* points out, it is not enough that the prosecutor argued that the order expires on July 1st -- He must recognize that the order requires an *immediate secession* of interception followed by *immediate sealing* of the tapes acquired when the object of the tapping has been achieved or when the wiretap itself can no longer serve a purpose.

Under the circumstances, for this reason alone a reversal is warranted.

POINT II.

THE STATUTE INVOLVED HEREIN, 18 U. S. C. 1955, INVOLVES THE NECESSITY OF FINDING THAT FIVE OR MORE PERSONS UNLAWFULLY, WILFULLY, AND KNOWINGLY DID "CONDUCT, FINANCE, MANAGE, SUPERVISE, DIRECT AND OWN AN ILLEGAL GAMBLING BUSINESS * * *." THE JURY, HOWEVER, WAS NOT SPECIFICALLY TOLD WHICH FIVE PERSONS WERE DIRECTLY ATTRIBUTABLE TO THE RESPECTIVE APPELLANTS HEREIN AND, CONSEQUENTLY, THERE MAY WELL HAVE BEEN A DEFECTIVE VERDICT SINCE THE JURORS COULD HAVE BEEN LESS THAN UNANIMOUS, NOT ONLY WITH RESPECT TO THIS COUNT, BUT WITH REGARD TO THE CONSPIRACY CHARGE AS WELL, WHEREIN THE SAME PROBLEM EXISTS EXCEPT THAT TWO OR MORE PEOPLE NEED BE INVOLVED. ONLY FOUR WERE ON TRIAL.

In the case at bar, the statute, 18 U.S.C. 1955, requires that five or more people conjoin to violate the statute. Neither the charge of the Court nor the verdict of jury specifically indicates that the jurors had to

find any specific five persons necessary to satisfy the requirements of the statute with respect to each of the appellants herein.

Since less than five people were involved in the trial of the case, it may well be that the jurors found different sets of five people and, consequently, were not unanimous in their verdict. Thus, in *United States v. Natelli*, 527 F. 2d 311, (2d Cir. 1975), cert. den. _____U.S._____, this Court held that where specifications in a single count might relate to more than one fact pattern unless supported in all possible ways, the conviction cannot stand.

Time and again the Courts held reversed convictions for failure to define adequately the legal principles involved, particularly where people are

allegedly acting in some joint enterprise (*United States v. Terrell*, 474 F. 2d 872 [2d Cir. 1973]; *United States v. Byrd*, 352 F. 2d 570 [2d Cir. 1965]; *United States v. Gagruilo*, 310 F. 2d 249 [2d Cir. 1962]). See, also, *United States v. Bryant*, 461 F. 2d 912 (6th Cir. 1972).

Where a jury may have convicted on an unproved specification, a new trial should be granted, as held in *Yates v. United States*, 354 U.S. 298, 312 (1957), where the Court stated:

> "We think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is important to tell which ground the jury selected."

See also, *Stromberg v. California*, 283 U.S. 359, 367-68 (1930), and *Street v. New York*, 394 U.S. 576, 585-86 (1969).

This principle has not been limited to cases involving constitutionally invalid statutes, as the Government had suggested in its unsuccessful argument in *United States v. Natelli*, *supra*.

In *United States v. Guterma*, 281 F. 2d 742, 747 (2d Cir. 1960), this Court reasoned:

> "The two prosecutions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale."

See, also, *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 619 (1959), and *United States v. Driscoll*, 449 F. 2d 894, 898 (1st Cir. 1971).

Thus basic error was perpetrated.

POINT III.

APPELLANT ALBAHARI WAS NEVER ARRAIGNED ON HIS INDICTMENT, NOR WAS HE GIVEN AN OPPORTUNITY TO ADDRESS MOTIONS THERETO. ACCORDINGLY, THE JUDGMENT AS TO HIM IS VOID SINCE THE COURT ACQUIRED NO JURISDICTION.

At 464 and 465 of the record it becomes obvious that Albahari was not aware that there had been a material change in the allegations against him by a superceding indictment.

Albahari's attorney moved to dismiss the indictment at the end of the government's case and for the first time learned that it had been

superceded,* and in the new true bill, the appellation "Brooklyn" as to Albahari had been eliminated. The trial court declared that it had ordered a plea of "not guilty" to be entered, but defense counsel and Albahari were unaware of it. They were never told of an arraignment and no opportunity to make motions was afforded (F. R. Crim. Pro. Rules 6, 7, 10, 11).

An arraignment must take place in open Court and is an important step in a federal case (Rule 10, F. R. Crim. Pro.; *Hamilton v. Alabama*, 368 U.S. 52, 54, n. 4; *McConnell v. United States*, 5th Cir. 1967, 375 F. 2d 905, 909; *Anderson v. United States*, D. C. Cir. 1965, 352 F. 2d 945, 946; *Sweeney v. United States*, 9th Cir. 1969, 408 F. 2d 121).

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* Defense counsel had learned of a contemplated superceder but no one ever told him it had come down.

The entire thrust of the defense may have been affected by this incredible error by the Court and prosecutor. It is obvious that the defense thought that it must shake the prosecution on the identity of "Brooklyn."

The whole thrust of the defense would possibly have been changed if he knew of the new indictment. The attack in cross was on the identity of "Brooklyn."

This was clearly not so, since the new indictment eliminated that appellation, but this fact was kept from Albahari. It is also manifest that a copy of the indictment was not served on him or his lawyer.

No opportunity to make motions was afforded and thus due process was denied on that score as well. We maintain that the court did not acquire jurisdiction of Albahari since he did not waive

arraignment and no effort was made to apprise him of it.

A plea to an indictment is an essential ingredient to the formation of an issue.

It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law,

and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous." So if the defendant be in custody he must be personally present at every stage of the trial where his substantial rights may be affected by the proceedings against him.

A lawyer cannot waive arraignment.

See *Crain v. United States*, 162 U.S. 625, 644, 645 (1896); *Hopt v. Utah*, 110 U.S. 547; and *McCarthy v. United States*, 394 U.S. 459 (1969).

POINT IV.

THERE WERE AT LEAST FOUR SEPARATE CONSPIRACIES PROVED AND THUS, THE CASE SUFFERED FROM FATAL VARIANCE AND THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

In *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975), this Court reversed the District Court because of the fact that in a conspiracy case more than one conspiracy had been established.

In the case at bar there were obviously several conspiracies and groups of conspirators. This included not only Breindel's group, but the "Mr. White" operation; the "Commander" operation, and the "National" operation. There was also "Esposito" and "Dixon."

The evidence adduced at trial reveals that these operations conducted separate gambling enterprises and while they may have laid off bets from time to time, there was certainly no cohesive conspiracy that linked them together.

In *United States v. Bertolotti*, 529 F. 2d at 155, this Court explained that the coincidence of certain common factors running through several disjointed conspiracies does not suffice under the *Kotteakos* rule (*Kotteakos v. United States*, 328 U.S. 750, 773-774). This Court explained, *id.*:

> "Indeed, the only common factor linking the transactions was the presence of Rossi and Coraluzzo. This type of a nexus has never been held to be sufficient. *Kotteakos v. United States*, * * *."

The petitioners asked for a severance so they could call each other as witnesses, but this was denied, too.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
A Member of the Bar
of this Court,
Attorney for
Petitioners.

APPENDIX.

DECISION (UNITED STATES V. ESPOSITO).

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and seventy-seven.

PRESENT: HON. WILLIAM H. MULLIGAN,

HON. MURRAY I. GURFEIN,

HON. ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judges.

- -X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ESPOSITO, RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, NICHOLAS RENNA, DAVID STEINBERG, LOUIS MAGGIO,

Defendants,

NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, DAVID STEINBERG,

Defendants-Appellants.

77-1147, 77-1149, 77-1184, 77-1185, 77-1227, 77-1228.

- -X

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern

District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed as to all defendants-appellants, except remanded for consideration of resentencing as to defendant-appellant John Yarmosh.

A. DANIEL FUSARO,
Clerk

by

Arthur Heller
Deputy Clerk

ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS.

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of December, one thousand nine hundred and seventy-seven.

PRESENT: HON. WILLIAM H. MULLIGAN,

HON. MURRAY I. GURFEIN,

HON. ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judges.

- -X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ESPOSITO, RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, NICHOLAS RENNA, DAVID STEINBERG, LOUIS MAGGIO,

Defendants,

NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, DAVID STEINBERG,

Defendants-Appellants.

77-1147.

- -X

A petition for a rehearing having been filed herein by counsel for the appellants John Iannone and Irving Albahari

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk.

ORDER DENYING REHEARING *EN BANC*.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of December, one thousand nine hundred and seventy-seven.

- -X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ESPOSITO, RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, NICHOLAS RENNA, DAVID STEINBERG, LOUIS MAGGIO,

Defendants,

NICHOLAS BOTTA, LAWRENCE MESSINA, JOHN YARMOSH, JOHN IANNONE, IRVING ALBAHARI, JOSEPH FALCO, DAVID STEINBERG,

Defendants-Appellants.

77-1147.

- -X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants John Iannone and Irving Albahari, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

No. 77-946

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN IANNONE AND IRVING ALBAHARI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-946

JOHN IANNONE AND IRVING ALBAHARI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 29-31). The opinion of the district court denying petitioners' motion to suppress is reported at 423 F. Supp. 908.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1977, and a petition for rehearing was denied on December 5, 1977. The petition for a writ of certiorari was filed on January 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a delay in sealing the recording of a court authorized wire interception of petitioner Iannone's conversation.

2. Whether the failure to rearraign petitioner Albahari upon the return of a superseding indictment constituted reversible error.

3. Whether the jury instructions were proper.

4. Whether the evidence showed multiple conspiracies.

STATUTES INVOLVED

18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> * * * * *
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; * * *
>
> * * * * *

18 U.S.C. 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be

> done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. * * * The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners, along with others,[1] were convicted of engaging in an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioner John Iannone was sentenced to concurrent terms of imprisonment for one year and one day. Petitioner Irving Albahari was sentenced to concurrent terms of two years' imprisonment, with 18 months suspended. The court of appeals affirmed without opinion.

1. The evidence at trial showed that from October 1974 until November 1975 Richard Esposito super-

[1] Co-defendants Joseph Falco and David Steinberg were also convicted at the joint trial. Co-defendants Richard Rizzo, Richard Esposito, Louis Maggio, and Nicholas Renna pleaded guilty to the substantive charge. Co-defendants John Yarmosh, Nicholas Botta, and Lawrence Messina pleaded guilty to the conspiracy charge.

vised an illegal gambling business known as the "Dixon Operation," which handled sports wagers in amounts of $300,000 to $1,000,000 a week (Tr. 58–59, 123–124, 276–277).[2] The wagers were transmitted by telephone to wireroom clerks located at various apartments in Manhattan (Tr. 125, 269–270). Petitioners were employed as runners; their duties were to induce bettors to place wagers with the operation, collect debts, and pay out winnings (Tr. 60–62, 101–105, 122, 265–274). In late December 1974, Robert Breindel arranged for petitioner Albahari to operate his own wireroom (Tr. 135–136).

In order to avoid the possibility of substantial losses, the Dixon Operation regularly laid off excess bets to the "National Operation," run by Joseph Falco, the "Commander I Operation," run by Nicholas Renna, and the "Mr. White Operation," run by Nicholas Botta, Lawrence Messina, and Joseph Yarmosh (Tr. 129–135, 277–278, 410–430).

2. Much of the evidence at trial was derived from court-authorized electronic surveillance. The first court order, authorizing electronic surveillance for 20 days unless the objective of the surveillance was attained sooner, was entered on June 11, 1975 (H. Ex. 1; H. Tr. 5–6).[3] A number of gambling-related conversations

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[2] Robert Breindel, a prosecution witness, was also involved in supervision of the Dixon Operation until he was arrested by local law enforcement officials in January 1975 (Tr. 58–59).

[3] "H. Tr." refers to the one volume transcript of the pretrial hearing held on December 20, 1976. "H. Ex." refers to exhibits introduced at that hearing.

were intercepted between June 11 and June 15, 1975 (H. Tr. 7).[4] On June 14, 1975, conversations were intercepted in which bettors were advised that the wireroom would be moved two days later (H. Tr. 8–9). No conversations were intercepted on June 16 and 17, and the supervising attorney was informed of the apparent change in location of the wireroom to a nearby location (H. Tr. 11, 87–88).

The wireroom had changed location on a previous occasion, and there was no indication that the move was permanent (H. Tr. 8–18). The FBI agent in charge of the surveillance was aware that it is customary to continue to accept wagers in a vacated wireroom from bettors who are uninformed of the gambling operation's new location (H. Tr. 12–13). The agent also knew that gambling related calls other than bets are often made from abandoned wirerooms (H. Tr. 12–13). Therefore, the FBI agent and the supervising attorney decided to continue the electronic surveillance (H. Tr. 88). No significant activity occurred in the old wireroom, and the surveillance was discontinued on June 23, 1975 (H. Tr. 15, 92–95). The authorizing judge was unavailable that day; the tapes were therefore sealed on the following day (H. Tr. 15,

[4] These conversations included one in which petitioner Iannone participated. Petitioner Albahari was identified by Breindel as a member of the operation but was not overheard during either interception.

80–81). The parties stipulated that the original tape recordings were not altered or edited in any way prior to sealing (H. Tr. 101–105).[5]

ARGUMENT

1. Petitioners claim (Pet. 10–18) that the tapes of the interception conducted pursuant to the court order of June 11, 1975, should have been suppressed because of a delay in sealing them. But 18 U.S.C. 2518(8)(a) directs that tapes of intercepted conversations are to be presented to the issuing judge for sealing "[i]mmediately upon the expiration of the * * * order." The order involved here authorized interception for 20 days, or until the objective of the investigation was achieved (H. Ex. 1). Surveillance was terminated on June 23, 1975, when it became evident that it was no longer effective, and the tapes were sealed on June 24. The order did not expire by its terms until July 1, 1975. There was thus no delay in sealing the tapes. Petitioner's contention that there was an eight-day delay is apparently based on the erroneous assumption that the objective of the investigation was achieved by June 16, when the wire-room moved to the new location. Instead, as the super-

[5] Electronic surveillance was also conducted at various locations pursuant to a second court order. Petitioners do not discuss any claims relating to that surveillance, in which neither was overheard. They do, however, adopt the arguments in the petition for certiorari filed by their co-conspirators Yarmosh, Botta, and Messina (Pet. 4). That petition (No. 77–135), which was denied on November 14, 1977, raised claims relating to the second surveillance. We are sending petitioners copies of our brief in opposition in No. 77–135, upon which we rely.

vising attorney testified, the decision to terminate the interception was based on the conclusion a week later that "the investigative objectives of [the June 11 order] could not be reached" by continued interception of the target phones (H. Tr. 92). Cf. *United States* v. *Ricco*, 421 F. Supp. 401, 406–407 (S.D. N.Y.).

Even assuming that the tapes should have been sealed immediately after the last gambling-related call was intercepted on June 15, the agents' decision that the interception should be continued because of the possibility that the phones might continue to be used for gambling-related purposes was reasonable and constituted the "satisfactory explanation" for the brief delay in sealing required by Section 2518(8)(a), as the district court concluded (H. Tr. 115). The court's resolution of this primarily factual question is consistent with the manner in which other courts have applied the sealing requirement in cases involving brief delays.[6]

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[6] The Seventh Circuit has upheld delays of 9 and 38 days in sealing to permit clarification of portions of duplicate tapes found to be inaudible during transcription (*United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7), petition for a writ of certiorari pending, No. 77–938). The Fifth Circuit has upheld a five-day delay in sealing during which time the tape recordings were transcribed (*United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855), and a 14-day delay where "[t]he government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants" (*United States* v. *Sklaroff*, 506 F. 2d 837, 840–841 (C.A. 5), certiorari denied, 423 U.S. 874). The Second Circuit has upheld a

United States v. *Gigante*, 538 F. 2d 502 (C.A. 2), upon which petitioners rely (Pet. 12–17), is clearly distinguishable. In that case, the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (538 F. 2d at 504), and "haphazard procedures" were followed in handling the tapes (*id.* at 505). There is absolutely no reason to doubt that, if confronted with similar circumstances, the panel that decided this case would, like the court in *Gigante*, have held that suppression was proper.[7]

2. The original indictment returned on November 22, 1976, named petitioner Albahari and included the alias "Brooklyn." Petitioner Albahari was arraigned less than two weeks later. A superseding indictment was filed on January 31, 1977, in which the

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seven-day sealing delay that was primarily the result of the government attorney's preparations for trial (*United States* v. *Scafidi*, 564 F. 2d 633, 641 (C.A. 2), petitions for a writ of certiorari pending, Nos. 77–1002, 77–1003, 77–1004, 77–6026, 77–6035, 77–6165), and six and thirteen day delays caused by efforts to have the issuing judge, instead of another judge, seal the tapes (*United States* v. *Fury*, 554 F. 2d 522, 533 (C.A. 2), petition for a writ of certiorari pending, No. 76–6828; *United States* v. *Poeta*, 455 F. 2d 117 (C.A. 2), certiorari denied, 406 U.S. 948). (The interceptions involved in *Fury* and *Poeta* were conducted pursuant to New York law. The sealing requirement of the state statute does not differ materially from that of 18 U.S.C. 2518(8)(a). See *United States* v. *Fury*, *supra*, 554 F. 2d at 533; see also 18 U.S.C. 2516(2). The tapes here were sealed on June 24, rather than June 23, because the issuing judge was not available on the 23d (H. Tr. 15, 80–81).

[7] Even if this case were inconsistent with *Gigante*, such an intra-circuit conflict would be for the court of appeals to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

name "Brooklyn" was deleted.[8] Petitioner Albahari claims (Pet. 22–26) that the trial court lacked jurisdiction to try him since he was not arraigned on the superseding indictment.

However, lack of formal arraignment is not reversible error unless prejudice is shown. *Garland* v. *Washington,* 232 U.S. 642, 645; *United States* v. *Rogers,* 469 F. 2d 1317 (C.A. 5).[9] At trial, when petitioner's counsel moved to dismiss the indictment for failure to rearraign petitioner, he conceded that he knew of the superseding indictment (Tr. 465). Indeed, the trial court concluded that counsel was "fully aware that there was a superseding indictment" (Tr. 466). In these circumstances, petitioner was not prejudiced by the absence of a formal rearraignment.[10]

3. Petitioners urge (Pet. 18–22) that the jury instructions were insufficient because they failed to identify the five persons alleged to have been involved in the violation of 18 U.S.C. 1955. They assert that, since there were only four defendants, and since Section 1955 applies to participation in an illegal gambling business that "involves five or more per-

[8] Petitioner incorrectly states (Pet. 7–8) that the alias "AC" was inserted in the superseding indictment.

[9] *Crain* v. *United States,* 162 U.S. 625, upon which petitioner relies (Pet. 26), was overruled by *Garland* v. *Washington, supra.*

[10] Petitioner Albahari asserts (Pet. 24) that he was prejudiced because he had attempted on cross-examination to establish that he was not "Brooklyn." But the fact that petitioner may have asked unnecessary questions on cross-examination does not demonstrate prejudice. The original indictment contained Albahari's real name, and Breindel identified him by that name (Tr. 102).

sons," the jury may have disagreed concerning the identity of the other participants in the business. But jury unanimity concerning the identity of the other participants in the business was not required. The court correctly instructed the jury that the participation of five or more persons in the business was an essential element of the crime that the government was required to prove beyond a reasonable doubt (Tr. 568–569, 587–588) and defined the type of participation required to bring an individual within the prohibition of Section 1955 (Tr. 587–588). Finally, it emphasized that each count and each defendant was to be considered separately, and that the jury was to return a verdict of guilty only if it unanimously concluded that the government had proved the essential elements of the crime charged by the required degree of proof (Tr. 604–605). Under these instructions, the jury could not have reached its guilty verdicts unless it was unanimously convinced that each defendant had participated in an illegal gambling business involving at least five persons.[11] That is all that is necessary to establish a violation of Section 1955, and any jury disagreement about the identities of the other participants in the enterprise was irrelevant. Cf. *United States* v. *Friedman*, 445 F. 2d 1076, 1084 (C.A.

[11] In fact, as the district court noted (Tr. 596), the scope and size of the Dixon Operation was not seriously challenged; instead, each defendant simply asserted that he was not a participant. Indeed, two confessed participants in the operation, Breindel and Daniel Kramer, testified at trial.

9), certiorari denied *sub nom. Jacobs* v. *United States,* 404 U.S. 958.[12]

In any event, petitioners' failure to object to the instructions concerning the number of participants or to request any further instructions—which is not surprising in light of the fact that the size of the enterprise was not seriously contested—bars their present claim. Rule 30, Fed. R. Crim. P.; *United States* v. *Bermudez,* 526 F. 2d 89, 97 (C.A. 2), certiorari denied, 425 U.S. 970; *Vitello* v. *United States,* 425 F. 2d 416, 423 (C.A. 9), certiorari denied, 400 U.S. 822.

4. Petitioners' final contention (Pet. 26–28), that the evidence showed multiple conspiracies, is also without merit and is wholly inappropriate for review by this Court. Petitioners claim that the evidence showed only that there were separate enterprises that "from time to time" laid off bets to each other. It is clear, however, that the gambling business prohibited by 18 U.S.C. 1955 includes those who regularly accept lay off bets. *E.g., United States* v. *DiMuro,* 540 F. 2d 503, 508 (C.A. 1), certiorari denied, 429 U.S. 1038; *United States* v. *Box,* 530 F. 2d 1258, 1265–1266 (C.A. 5); *United States* v. *Schaefer,* 510 F. 2d 1307, 1312 (C.A. 8), certiorari denied, 421 U.S. 975, 978. The jury was twice instructed that "[w]hether a person accepting layoff bets knowingly associates himself with

[12] The cases upon which petitioners rely (Pet. 19–22) are inapposite, since they involve instructions that permitted the jury to return a guilty verdict on an erroneous legal theory. There is no such problem here.

the conspiracy * * * is a question of fact for you to decide" (Tr. 574, 611). Each time, the court carefully explained the factors relevant to that determination. Petitioners do not challenge these instructions; this Court need not review the jury's factual conclusion that the evidence showed a single conspiracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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